

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Wednesday, January 25, 2017

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lodge, Vice Chairman Lee, Senators Davis, Hagedorn, Agenbroad, Foreman, and Burgoyne.

ABSENT/ EXCUSED: Senators Anthon and Nye

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Lodge** called the Senate Judiciary and Rules Committee (Committee) to order at 1:35 p.m.

PASSED THE GAVEL: Chairman Lodge passed the gavel to Vice Chairman Lee.

DOCKET NO. 11-1101-1601 **Rules of the Idaho Peace Officer Standards and Training Council (POST) clarifying the definition of "Law Enforcement Profession," establishing the minimum prohibition of marijuana use, simplifying driver license status requirements, and simplifying the Agreement to Serve requirements. Victor McCraw**, Division Administrator for Idaho Peace Officer Standards and Training (POST) explained the administrative division operates under the POST Council (Council) which is made up of 15 individuals including sheriffs, chiefs, prosecuting attorneys, attorneys from the Attorney General's office, and representatives of the cities and counties. The Council gives guidance to the administrative division. The POST mission is to develop skilled law enforcement professionals who are committed to serving and protecting the people of Idaho. The rules by which POST functions are essential in accomplishing that mission.

Mr. McCraw stated that Sections 010 and 081 of **Docket No. 11-1101-1601** will be discussed together because the cause of the proposal is the same. Section 010 proposes changes for the definition of "law enforcement profession" as it applies to the POST rules only. It does not affect any other statutes or laws. Section 081 seeks to clarify what "Agreement to Serve" means. The proposed changes for the definition of law enforcement profession removes all unnecessary references to job duties, and they align the definition with the established titles of the nine certified law enforcement disciplines. **Mr. McCraw** identified those disciplines as:

1. Peace Officer, which is patrol officer;
2. County Detention Officer;
3. Communication Specialist;
4. Juvenile Detention Officer;
5. Juvenile Probation Officer;
6. Correction Officer;
7. Adult Probation and Parole Officer;
8. Idaho Department of Juvenile Corrections direct staff; and
9. Misdemeanor Probation Officer.

Mr. McCraw referred to Section 081 regarding the Agreement to Serve. Each trainee attends an academy. The academies differ in length depending on the disciplines and carry a cost for the training. He pointed out that training in four of the nine disciplines, numbers one, two, six, and seven from the list above, carries no charge to the agency as it is done through POST funding. When POST-trained individuals who serve in those disciplines leave the profession before serving two years, and consequently no longer serve the citizens of Idaho, the agreement allows POST to recoup some of the cost. If the POST-trained individuals stay beyond one year, there is a proration. If they leave immediately or within a few months for reasons other than being laid off or some medical or family emergency, the account, if not paid, is turned over to a collection agency. **Mr. McCraw** disclosed that currently POST is owed over \$750,000 from 333 individuals who left the profession within two years. Not all can be recouped because some unpaid accounts are beyond the statute of limitations. The rule changes will help POST recover those costs.

Senator Davis asked for clarity regarding uncollectible funds due to the statute of limitations. **Mr. McCraw** stated the money is owed to POST, but some of that amount cannot be collected. He commented the contract with the collection agency has been in place only a short time, so collection of the older accounts has just begun. **Senator Davis** asked if POST has assigned to the collection agency the collection of obligations that, as a matter of law, the State would be barred from collecting because of a limitation on actions. **Mr. McCraw** indicated that POST operates under the advice of their legal counsel, the Deputy Attorney General assigned to the Idaho State Patrol, who has defined what may be turned over to collection by matter of law. **Senator Davis** inquired if POST is only assigning for collection obligations in which POST has a lawfully enforceable claim. **Mr. McCraw** stated the answer is yes. **Senator Davis** alleged that would mean if an action is outside of the statute of limitations, the State is not trying to collect funds which are not otherwise enforceable. He asked if that is true. **Mr. McCraw** replied that is true.

Senator Davis inquired about the section regarding drug use. He remarked that in the past an applicant would be rejected if he/she used marijuana in the past three years. The change will adjust that time to one year. He then referred to the "regular and confirmed basis" in the past three years. He asked why it is important to have that policy shift. **Mr. McCraw** explained he will address that issue. It was skipped because the previous sections were taken out of order.

Vice Chairman Lee asked if anything has been added to or deleted from the definitions. **Mr. McCraw** replied the changes simply reduce the number of words to simplify the definitions, making them more understandable. **Vice Chairman Lee** inquired if, in the section on "in lieu of termination" when someone resigns, POST received any feedback from other jurisdictions regarding allowing people to leave for reasons other than for cause or discipline. **Mr. McCraw** responded that several times a year the hearing board, a three-member panel of the full Council, meets to hear the cases in which the individual feels he/she has an explanation that should be considered prior to being charged those costs. Due process is provided with the hearing board and the full Council.

Senator Hagedorn asked if Fish and Game Conservation Officers go through the Peace Officers certification. **Mr. McCraw** replied yes.

Mr. McCraw proceeded with a discussion of Section 055 involving marijuana use. He explained that the pending rule reduces the absolute prohibition of marijuana use prior to application to POST to one year. It revises the prohibition of regular and confirmed use to three years. The original rule states three years and five years respectively. **Mr. McCraw** explained the difficulties involved in the administration of this rule including the accuracy of self-reporting by the applicant. The Council decided that the use did not affect the suitability of the applicant as related to one or three years, but lying about the extent of use would be a problem with respect to character. If the behavior was not recent nor habitual in the last year, the requirement would be met. The prior use of "regular and confirmed" was problematic because it is difficult to find people who may know of this behavior from five years ago. The one-year limit allows POST to find witnesses concerning the applicant's drug use. **Mr. McCraw** observed that an applicant's suitability considering non-habitual, non-recent behavior is better assessed by a thorough background investigation and the hiring agency's subjective discretion than by the application of a pseudo objective rule. Instead of the applicants' best guess, background investigations will confirm whether they have or have not used, and if they have, those investigations will reveal the time frame and quantity of use. **Senator Davis** expressed concern about the ambiguity of the word "regular" in the phrase "regular and confirmed use." **Mr. McCraw** agreed with the analysis that the word is ambiguous, but informed the Committee that he can decide to send an applicant to a hearing board to help clarify the individual's situation. The hearing board will then evaluate the information and review the investigative findings. The Council does not want to reject an applicant based on this behavior alone. They consider other behaviors and characteristics as well. **Senator Davis** pointed out the unclear use of punctuation and requested that this be modified the next time POST reviews their rules.

Senator Burgoyne expressed appreciation for relaxing this standard. He inquired about the word "marijuana" as it appears in Section 055.01, asking if the current interpretation of the word "marijuana" includes FDA drugs and or those being tested for FDA approval. He also asked if someone using marijuana legally would be rejected for POST. **Mr. McCraw** remarked that the legality of the use was specifically and purposely avoided by the Council. The behavior and the substance were removed from the other controlled substances which are listed elsewhere. Any controlled substance, whether prescription or not, falls under this rule. The intent of the Council was that whether it be legal or illegal use of this drug, as long as it is considered a controlled substance and against federal law, it is to be interpreted within the definition of marijuana. **Senator Burgoyne** encouraged Mr. McCraw to clarify what is meant by "marijuana" if there is an FDA-approved drug. If it is not illegal under federal or Idaho State law, the rule needs to make clear what marijuana is and that it be limited to that which is illegal under state or federal law.

Senator Burgoyne illustrated his concern for the terms "regular and confirmed" using an example of college students who travel once a year to a country where marijuana is legal and where the students use the drug. This use can be considered regular as it is yearly, and it would be confirmable. He asked if these individuals would be denied acceptance to POST. He asserted that "regular" has no indication of frequency. He requested Mr. McCraw consider that issue. **Mr. McCraw** related that these terms were discussed by the Council. He stated defining the two terms too narrowly will cause the exclusion of applicants rather than giving them a chance to be heard before the hearing board. **Senator Burgoyne** suggested they go back to the introductory phrase and change "must" to "may." That change would allow POST to consider those situations on a case by case basis.

Senator Foreman thanked Mr. McCraw for POST's good work. In referring to the marijuana use time frame, he stated he would like to see the stricter standards stay in place. He asserted that applicants may not be honest when they claim they don't remember the extent of their use. **Senator Foreman** expressed his lack of tolerance for any illegal drug use as he has seen its effects. He pointed out that police officers have a big responsibility in serving the public. He inquired if this change was driven by recruitment. **Mr. McCraw** addressed the issue of the applicant not remembering the extent of his/her marijuana use. He indicated that most people do not keep a diary of their drug use, and so they do not know the time and frequency of the use. Because of the ambiguity of the terms the Council would like to have a minimum standard of one year. He reported that several agency heads have already told POST they are keeping the three year standard. The one year POST standard is a minimum standard for the agencies. **Mr. McCraw** stated with regard to the change being recruitment driven, that he has heard some concerns with the rule but has not seen any hard numbers indicating Idaho is losing applicants to other states because of the current rule. He remarked that agency heads are in a dilemma when there is an applicant who scores a 90 percent on the aptitude test but took a puff of a marijuana cigarette over a year ago, versus another who scores a 65 percent on the test but has never used marijuana. The agency has an opening they can't wait over a year to fill, so they have to take the less qualified applicant. **Senator Foreman** asked that emphasis be given to keeping the standards up as high as possible with respect to prior illegal drug use. He emphasized that the wearing of the badge is a sacred commitment, and that Idaho has the finest law enforcement anywhere.

Vice Chairman Lee commented that these rule sections regarding marijuana use by officers appear to have been changed, and she asked what they were before the changes. **Mr. McCraw** replied he began with POST in November of 2014, so he does not know. He observed that the rules have been in place for some time. He deferred to Meridian Police Chief and POST Chairman Jeff Lavey. **Chief Lavey** advised that prior to 2014 there was a lack of consistency across the State. A survey was conducted to establish a consistent policy for addressing drug use. The Policy resulting from that survey was presented to the Legislature in 2014, but it has resulted in numerous issues. He emphasized that he will not lower his standard of three years for hiring in Meridian, but he is not completely opposed to POST changing to a one year standard. **Chief Lavey** stated he sits on the review board and the vagueness of "regular and confirmed" allows applicants to come before the whole POST Council and tell their story. Common sense can then be applied in making the decision on a case by cases basis. **Chief Lavey** explained that when this change was first proposed, the Sheriffs wanted the change, but the police chiefs did not. He indicated that the chiefs are now in favor of the change, and that shift in attitude was based on recruitment issues.

Mr. McCraw continued on with Section 058, dealing with traffic record investigation and driver license status of the applicants. This change clarifies what is and what is not acceptable with regard to the driver license status. As the rule is written, the Division Administrator is required to look at every license suspension regardless of how much time has passed since the suspension. This change will reduce the number of suspension reviews and allow the consideration of what is important considering the suspension.

Senator Burgoyne expressed concern that if the change is from a two-year standard to a 10-year standard, it appears the opportunity to be admitted to POST is being reduced. **Mr. McCraw** responded the actual net affect would increase the chances of meeting the standard. Under the present rule, regardless of when the suspension occurred, it must be investigated. This rule eliminates anything that is a license suspension without criminal behavior beyond ten years. The two-year standard allows the administrator to waive suspensions not based on vehicle operation, eg. too many parking tickets. He pointed out the rule will still allow him to send questionable situations to the Council. **Senator Burgoyne** expressed further confusion. **Mr. McCraw** clarified that under the new rule there will be a limit of ten years. In addition, under the old rule if the suspension was within the two years prior to application to POST, the Council had to consider the case which could delay the applicant's admission for months. Under the changes, the administrator has discretion and would only send the most serious cases to the Council.

MOTION: **Senator Foreman** moved to approve **RS 24625**. **Chairman Lodge** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 11-1101-1602 **Rules of POST establishing a requirement for a POST compliance review of each applicant involving a background investigation.** **Victor McCraw**, Idaho POST Division Administrator, indicated that this change was in subsection 059, dealing with background investigation. He stated that this change is necessary to maintain the standards of POST. The basic investigation remains the same, but the documents must be compiled and retained, and the documents must be available to POST.

Senator Foreman referred to the statement on page 19 that says the Federal Bureau of Investigation (FBI) does not recognize POST as a law enforcement entity, and asked if the FBI has a problem with agencies sharing National Crime Information Center (NCIC) information with POST as a non-law enforcement agency. **Mr. McCraw** responded that the FBI has very strict rules regarding what can and what cannot be shared. He indicated that POST might be considered a criminal justice agency by Idaho statutes next year. The agencies can verify the applicant meets the requirements, but they cannot give POST any specific information. He added those agencies retain the records.

Senator Davis asked if POST is waiting another year to run the statute. **Mr. McCraw** answered the wording was not ready in time to meet the deadline for this year. **Senator Davis** inquired how much POST is disadvantaged by not having access to the information. **Mr. McCraw** replied the disadvantage is that POST cannot verify specifics about any candidate, and POST cannot conduct independent investigations to gather that information. **Senator Davis** asked if Mr. McCraw could share the proposed legislation with him. **Mr. McCraw** replied the Chairman of the POST Council has authorized him to share that information.

Senator Hagedorn pointed out that the current rule says the hiring agencies research and retain the records. He asked if the agencies will continue to do so. **Mr. McCraw** replied that the agencies would continue current practices. He added if POST regains the ability to conduct background checks using the FBI data base, the records would still be retained by the agencies. **Senator Hagedorn** suggested this would produce duplicate efforts if both POST and the agencies maintain the records. **Mr. McCraw** replied it is best practice for the agency to maintain these records, but it is not in rule that they do. The agencies need to have the records on file in order to know the status of their officers, and POST needs to have them, not only for applicant scrutiny, but also to be able to run background checks on currently certified officers in violation of POST's code of conduct who are undergoing decertification proceedings.

MOTION: **Senator Burgoyne** moved to approve **Docket No. 11-1102-1602**. **Senator Foreman** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 11-1102-1601 **Rules of POST clarifying certification requirements for part-time juvenile detention officers, and eliminating the use of non-POST certified instructors for basic training.** **Mr. McCraw** explained this change in the rule is simply to improve the language. He stated that it removes unnecessary language referring to "the desire to become certified", and it removes references to "uncertified instructors" who are not being used. It also removes reference to "Verbal Judo" which is a trade name of a training product and should not appear in the rule.

MOTION: **Chairman Lodge** moved to approve **Docket No. 11-1102-1601**. **Senator Agenbroad** seconded the motion. The motion passed by **voice vote**.

DOCKET NO. 11-1104-1601 **Rules of POST amending the text of the pending rule regarding correction officers and adult probation and parole officers.** **Mr. McCraw** reported the Council agreed that all disciplines "shall meet the same standards for conduct and character. " As rule changes have been made this language was omitted in the case of correction officers. He advised this change includes correction officers under that standard. **Senator Davis** clarified the intent and result of the vote on this rule change. **Mr. McCraw** responded that these changes would improve the administrative processes for POST. **Senator Davis** inquired if there was any opposition to the proposed change. **Mr. McCraw** declared that both former Director Kevin Kempf and current Director Henry Atencio of the Idaho Department of Correction (IDOC) were present and expressed support for this change.

MOTION: **Senator Hagedorn** moved to approve **Docket No. 11-1104-1601**. **Senator Burgoyne** seconded the motion. The motion passed by **voice vote**.

PASSED THE GAVEL: Vice Chairman Lee passed the gavel back to Chairman Lodge.

Senator Lodge announced that the Committee will be meeting Friday, February 3. The meeting will start at 1:00.

ADJOURNED: There being no further business at this time, **Chairman Lodge** adjourned the meeting at 1:42 p.m.

Senator Lodge
Chair

Carol Cornwall
Secretary